CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

FRANK W. GUY, W. T. STANWORTH, ET AL.

vs.

JOHN A. DONALD.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED JULY 26, 1905.

(19,860.)

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SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Page.
Certificate from the United States circuit court of appeals for the fourth circuit	1
Statement of facts	1
Questions certified	4
Judge's certificate	4
Clerk's certificat	5

United States Circuit Court of Appeals.

FOURTH CIRCUIT.

No. 600.

CERTIFICATE OF QUESTIONS BY THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

Filed July 7, 1905.

Frank W. Guy, W. T. Stanworth et al., Appellants, *versus* John A. Donald, Appellee.	Appeal from the District Court of the United States for the Eastern District of Virginia. At Norfolk.

The United States Circuit Court of Appeals for the Fourth Circuit, certifies that from the record on file in the above entitled cause, which is now pending in this court on an appeal from a final decree in favor of John A. Donald, the appellee, and which is undetermined, the following facts appear:

On January 14, 1901, a collision occurred between the Steamer Santuit, owned by John A. Donald, and the Schooner Churchman. The said steamer was coming into the Capes of Virginia from a foreign voyage, and as she approached the Capes, she was spoken by the Virginia Pilots, and Franklin W. Guy, a regularly licensed Virginia pilot, one of the appellants, was put aboard as pilot. He thereupon took charge of her navigation and proceeded to bring the vessel in from sea. Some distance below Thimble Light he sighted the Schooner "George Churchman," about three points on his port bow and distant from one to two miles He kept his course unchanged, the schooner keeping on hers, and their courses were intersecting. The master of the steamer called the attention of the pilot to the schooner, and urged him to do something to avoid her; but the pilot, while still in charge of navigation aboard the steamer,

brought the said steamer into collision with the schooner. There was no *vis major* and no other vessels in the way. The schooner kept her course to the last. The schooner was greatly damaged, and on arrival of the steamer at Norfolk, the schooner having been towed in, the owner of the schooner made claim against the steamer for the damages caused by the collision. Both the owner of the steamer and the owner of the schooner employed counsel. The schooner owner presented a bill for $4,375.00, and John A. Donald, the appellee, the owner of the steamer, after considerable negotiation and on the eve of suit, settled the claim for $3,175.00. On November 10, 1902, he filed a libel *in personam* against the Virginia pilots who form the Virginia Pilot Association, claiming that the collision was due to the negligence of Guy, the pilot in charge, and that they were liable for his negligence. The pilots excepted to the libel, on the ground that they were not liable for the negligence of each other. After argument, the District Court overruled the exception, and held that they were so liable (*Donald* v. *Guy*, 127 Fed. R., 228). Thereupon the defendants answered, denying liability on the merits. The case was tried, and the District Court held that the collision was solely due to the negligence of Guy, the pilot in charge, and that those composing the Pilot Association were liable for his negligence (*Donald* v. *Guy*, 135 Fed. R., 429).

The third paragraph of the libel in the case charges as follows:

"Third. The said defendants, as a matter of convenience to themselves, and in order to avoid conflict as to their respective rights to board vessels, have formed themselves into an unincorporated association, which they call the Virginia Pilot Association. The libellant avers that the general terms of that association are that the pilots have agreed among themselves that they shall take turns in boarding vessels which are required by the statute to take a pilot. By a further agreement among themselves, the fees, which would otherwise be due the individual pilots for pilotage, are not paid by the vessels boarded to the special pilot that boards her, but are paid into a common fund and put in bank to the credit of said Virginia Pilot Association. The said parties, as members of the Virginia Pilot Association, own various property, including pilot boats, office furniture, and they lease offices and undergo various other expenses necessary to the conduct of said business. The funds collected from vessels for pilotage constitute a common fund, out of which they pay all expenses incident to the business, including office expenses,

expenses of operating their pilot boats, etc., and the balance remaining after such expenses is divided among the said parties. The bills for pilotage are made out in the name of the Virginia Pilot Association, and the bills against the said business are paid by checks of the Virginia Pilot Association.

The said defendants have elected O. E. Edwards as president of the said association and the above named W. T. Stanworth as secretary of the said association."

The libel propounded certain interrogatories to W. T. Stanworth, one of the defendants, which, with the answers thereto, are as follows:

"1. Are you secretary of the Virginia Pilot Association? A. I was on the 14th day of January, 1901.

2. Where are the records of said association kept? A. In the office of the Virginia Pilot Association, 273 Main Street, Norfolk, Va., such records as we keep.

3. Has the said association a constitution and by-laws, and if so, file a copy of the same with your answer? A. They have, and a copy is herewith filed.

4. If it has not a constitution and by-laws, in what shape is its organization, and file a copy of same with this answer in whatever shape it may be? A. It has a constitution and by-laws, a copy of which has been filed in accordance with my answer above.

5. What is the agreement among the members of the said association, or the rule, as to the order in which vessels who are required to take pilots shall be boarded? A. Briefly, turn and turn about; the first man in port is the first man sent out.

6. How are the bills for pilotage made out, and in whose name? File with this answer a copy of one of the blank bills. A. They are made out in the name of the Virginia Pilots Association, except in cases of national vessels and disputed bills.

7. When collections of pilotage are made, where are they put and to whose credit are they deposited? A. Sometimes in the safe in the office; sometimes deposited in bank to the credit of the Virginia Pilots Association.

8. When bills are paid by check, how is the check signed? File one of your blank checks with this answer. A. Signed by the president, countersigned by the secretary then acting as such.

9. What is the agreement among the members of the association as to the manner in which the profits are divided among each other, and how are the profits ascertained? A. At that time net profits were divided equally according

to the number of days a pilot was upon the active list, to say from thirty to thirty-five days, after the fixed expenses and necessary charges of the keeping of its equipment up to a seaworthy standard have been deducted from the gross earnings for this length of time.

10. If you are not secretary, who is? A. I was secretary at that time.

11. If the association has no officer by the title of secretary, who keeps its records, and what is his title? A. This has been answered by question 10.

12. The above questions are intended to apply to the state of affairs as they existed on January 14, 1901, and not to the date when the answer is filed.

Answer all of the above questions as of January 14th, 1901."

And thereupon the Circuit Court of Appeals for the Fourth Circuit certifies that the following questions of law arise and are presented by the assignment of errors in this case; that their decision is indispensable to a correct determination of the case, and to that end it desires the instruction of the Supreme Court concerning the same and for the proper decision of the same:

First. Are the members of the unincorporated association of pilots regularly licensed under the statutes of Virginia, organized as shown by the above statement of facts, and conducting its business as thereby shown, a partnership?

Second. If it is a partnership, are its members who are regularly licensed pilots under the statutes of Virginia, liable as such to owners of vessels piloted by them for the negligence of each other?

Third. If the members of this association do not technically constitute a partnership, are they nevertheless jointly liable to third parties whose vessels they navigate as pilots, for the negligent acts of each other?

As witness our hands this 7th day of July, A. D. 1905.

NATHAN GOFF,
Senior Circuit Judge.

J. C. PRITCHARD,
Circuit Judge.

THOS. J. MORRIS,
Dist. Judge for the District of Maryland.

UNITED STATES OF AMERICA, } *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the original certificate filed and now remaining of record in the therein entitled cause.

Seal of the Court.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, Virginia, on this 17th day of July, A. D. 1905.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

FILE COPY.

Office Supreme Court, U. S.
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OCT 29 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

FRANKLIN W. GUY ET AL.

vs.

JOHN A. DONALD.

BRIEF FOR GUY ET AL.

R. C. MARSHALL,
D. TUCKER BROOKE,
Counsel for Appellants, Guy et al.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23629

(19,860.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

In Admiralty.

FRANKLIN W. GUY ET ALS., APPELLANTS,

vs.

JOHN A. DONALD, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLANTS.

This is a case of a libel *in personam,* instituted by John A. Donald *vs.* Franklin W. Guy and others, some twenty-six in number, jointly, who compose the Virginia Pilot Association, to recover damages alleged to have been sustained by the owners of the schooner *George Churchman,* arising from the collision between the steamer *Santuit,* of which the said John A. Donald is owner, and the *Churchman,* in the Chesapeake bay, near Thimble light, on the 14th day of January, 1901.

The respondent, Franklin W. Guy, as licensed Virginia pilot, was the pilot on board of the *Santuit* at the time of the

collision. It is claimed that the collision was the result of the negligence of the said Guy, and that he and his co-respondents, who compose the Virginia Pilot Association, are jointly responsible for damages to the said John A. Donald.

In the lower court two exceptions to the said libel were filed, one by the said Franklin W. Guy, severally, and the other by all of the said respondents, jointly and severally.

In the exception filed by himself severally to the said libel, the said Franklin W. Guy sets up as his defense the effect of this payment voluntarily and without suit, and without notice to him, of the damages now sought to be recovered against him by the said John A. Donald.

As to this exception we have nothing to say, for the reason that the certificate from the United States Circuit Court of Appeals for the Fourth Circuit submits for the consideration of this court only questions arising under the second exception filed in the lower court, which is the exception of Franklin W. Guy and others (viz, the other defendants, members of the Virginia Pilot Association), and raises the objection that there is no liability upon the other defendants for the negligent and unskillful acts of the said Franklin W. Guy, even if the allegations thereof in the said libel contained be in fact true.

We contend that there is no such copartnership between F. W. Guy and the other defendants as would in any sense render them liable for the action of the said Guy as pilot.

The pilot law of this State is contained in chapter 89 of the Code of Virginia, edition of 1887, sections 1955 to 1990, inclusive.

It will be seen from section 1957 that before a pilot can act as such he gives a bond in the penalty of $500, to be filed with the clerk of the corporation court.

Section 1963 of the Code provides a penalty for piloting vessels without authority, or employing unauthorized persons as pilot, fixing a penalty of $100 for so doing, to be paid by the master of a vessel to any regular pilot who shall sue for the same; so section 1964 provides that pilotage must be

paid to the pilot offering his services, and section 1965 that this pilotage must be paid to the *first* regular pilot who offers his services. Section 1969 fixes the compulsory rates of pilotage to be paid to pilots, sections 1970-75 fixing the respective amounts. Section 1976 distinctly sets out that the master of any such vessel, &c., shall be liable to the "first regularly licensed pilot" who "offers his services," and section 1978 is in part as follows:

"*Liability for Pilotage.*—The master and owner of any "vessel shall each be liable to the pilot for *his* pilotage and "other allowances, and also the consignee, or supercargo, of "any vessel not owned by a citizen of the State, shall deposit "with some responsible person, subject to the order of the "pilot, the amount of the pilotage due *him.*"

Section 1979 provides that pilots may state their accounts, verified by affidavit, and lodge them for collection with their agents, &c.

Section 1982 provides that "nothing herein shall author- "ize such board to decide upon the liability of a pilot, or his "apprentice, to any person injured by his negligence, or "misconduct, or to prevent such person from recovering for "any damage occasioned thereby."

And, further, we say, under the statutes made and provided as to pilots and pilotage, that in order to carry out the provisions of the same it is necessary to own vessels, employ men to man and navigate the same, have agents, and keep an office.

If any single pilot undertook to do this the expenses thereof would be largely in excess of any possible receipts he could make from his services; and thus it would be impossible, without co-operation between individual pilots, to give that aid and assistance to the commerce of the State which is absolutely necessary to the maintenance of our ports.

Thus it becomes necessary for the individual licensed pilots of the State, each having his own duty to the State and his own emoluments from his office as pilot, to jointly make

provision for the maintenance of such vessels and other appliances necessary to conduct the business and carry out the law which is intended to protect, foster and advance the commerce of the State, but without in any sense abrogating his individual rights and duties, as an officer of the State, under the law, which in terms makes the masters, owners, and consignees of vessels liable only to the *individual pilot* for the pilotage prescribed by the law; and *thus* makes the contract of pilotage with the individual pilot, and with him alone.

The law having thus put upon the individual pilot the *duty* to pilot the particular vessel, and upon the particular vessel the *duty* to employ the individual pilot, the law makes the contract between the individual pilot and the particular vessel—on the one hand to employ the pilot, and on the other to perform the piloting properly—and it seems to us that there is no such relation between the particular vessel and any other persons than the individual pilot as would give the vessel any claim against them for damages resulting from a violation by the individual pilot of the duties imposed upon him by the said contract.

Now, if it be claimed that the allegations of section "third" of the libel must be taken as true for the purpose of this argument, and that such allegations set out a case of combination of individuals in a common business, participating, in an agreed proportion, in the profits and losses of the common business, we still reply that this condition of facts does not, of *necessity*, create copartnership between the parties so participating in the business and the profits and losses of the same.

While for a long time in the history of our jurisprudence the participation in common loss and profits of a common business was one of the most conclusive tests of copartnership relations, yet the later and best opinion now is that this is not necessarily so.

The courts have come to the conclusion, as the result of an attrition of ideas, that the question of partnership or no part-

nership is not to be settled by arbitrary tests; that to attempt to do so is mischievous, resulting in error.

Beecher *vs.* Bush (1881), 45 Mich., 188, citing Meachem's Elements of Partnership, sec. 63, note *ubi supra,* sec. 68.

What, then, in the absence of conclusive tests, is the essential element of copartnership? "That the parties are mutually principals of and agents for each other."

Beecher *vs.* Bush, *ubi supra.*

Now, we contend that in the case of pilot associations the individual pilots are not, and under our statutes cannot be, each the agents of the other members.

Our entire system of statutes on this subject show that the individual pilots are quasi-public officers; they derive their authority not from the association, but from the State; their service is personal, and in its performance they represent only themselves, individually, with a responsibility only to the State; their right to compensation is given to them individually by statute, as officers of the State; their fees are fixed by statute, as the fees of other State officers are; and there can be no copartnership in State officers.

Sec. 18, Meachem on Elements of Partnership.

If we are correct in our contention that no copartnership can exist between persons holding a public office or invested with a personal trust, then we submit that the provisions of the statutes of 1775 and 1792, cited by the plaintiff's counsel, do not affect the proposition for which we contend, because in this view of the case those statutes are enabling statutes, authorizing pilots, if not more than two or four in number, to form a copartnership.

When, therefore, these enabling provisions were omitted from the Code of 1849, the result was to leave the law as it was before these statutes were passed. The question, there-

fore, works back to the original inquiry, whether, independent of the statutes, pilots have a right to form a copartnership. We have sought to show that they have not.

If, therefore, the parties who are sought to be held as partners cannot, under the law, occupy the relation each of principal for himself and agent for his associates (because each renders only a personal service), no *presumption* of copartnership, arising from the participation in the profits of the concern, can exist, because the relation of partnership *inter sese* cannot *legally* exist between them.

Our contention, therefore, is that these pilots are quasi-public officers, or at least invested with a personal trust; that, this being so, they cannot occupy the relation of principals for themselves and agents for their associates (without which, a copartnership cannot exist), for, under the principles of the common law, it is against public policy for a copartnership to exist in public offices.

> Jones *vs.* Perchard, 2 Esp., 507; Canfield *vs.* Hard, 6 Conn., 180; See Gaston *vs.* Drake, 1 Nev., 175; Seely *vs.* Back, 42 Mo., 143; Bowen *vs.* Richardson, 133 Mass., 293; Gould *vs.* Kendall, 15 Neb., 549; Warner *vs.* Griswold, 8 Wend., 665; Wolcott *vs.* Gibson, 51 Ill., 69.

Second. The fact that the State imposes a "personal" obligation to perform the duty of pilotage affects the legality of such a partnership, in that it makes them public officers, and so renders it impossible to form a legal partnership.

It is the personal element which distinguishes the case of the pilot from that cited of railroad company or common carrier. A corporation cannot, from the nature of things, be a public officer; hence the cases are not analogous.

Third. The pilot association pleads no wrong in its defense, since it denies the existence of the partnership and cites the illegality only to show that, had it desired, it could

not have formed one. Had it claimed to be an "illegal partnership," then its illegality might not have been set up.

Fourth. If a court may take judicial cognizance of the statute laws of the State, our contention is that they may also take cognizance of the rules and regulations of a body created by those statutes, by them invested with the power of making rules and regulations supplementary to the provisions of the statutes.

This is the position in the statute law of the land occupied by the rules and regulations of the board of pilot commissioners.

We call especial attention to the case of the *City of Dundee* (103 Fed., 696) and the same case affirmed upon appeal (108 Fed. Rep., 679), in which the exact question involved here arose, and in the same way, upon the Pennsylvania pilot laws, which are identical with ours in the fact (as stated in its opinions) that the individual pilots formed themselves into an "incorporated" association, *inter sese*, for "the management of its pilot-boats and the division of the moneys received from its members to their respective shares, as set forth in its rules," where it was held that there was no copartnership.

See also Mason *vs.* Ervine, 27 Fed. Rep., 459.

Respectfully submitted,

R. C. Marshall,
D. Tucker Brooke,
Counsel for Appellants.

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CLERK

SUPREME COURT OF THE UNITED STATES.

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FRANK W. GUY ET AL.

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BRIEF FOR JOHN A. DONALD.

ROBERT M. HUGHES,
Counsel for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23498

(19,860.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 90.

FRANK W. GUY, W. T. STANWORTH, ET AL.,
APPELLANTS,

versus

JOHN A. DONALD, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLEE.

Statement.

On January 14, 1901, the appellee (libellant in court below) was the owner of the steamer "Santuit." Early that morning the steamer was coming into the Capes of Virginia from a foreign voyage. She was hailed by the Virginia pilots, and Franklin W. Guy put aboard as pilot. He thereupon took charge of her navigation. It was just about daylight, the weather was clear, and there were but one or two other vessels in the vicinity. He came on up the channel leading into Hampton Roads, and some little distance below Thimble Light sighted a schooner about three points on his port bow, and distant from one to two miles, showing her

green light. He kept on his course unchanged, the schooner keeping on hers, their courses being intersecting, as the schooner was sailing about north and the steamer west northwest, the relative positions being known to the pilot at the time. The master of the steamer, when they began to draw near, called his attention to the schooner, and urged him to do something to avoid her; but the pilot brought the steamer into collision with the schooner, the latter keeping her course to the last. The schooner was brought to Norfolk. Both parties employed counsel. Donald, the owner of the steamer, compromised with the schooner on the eve of suit, paying $3,175.

On November 10, 1902, he libeled the Virginia Pilot Association *in personam* for the amount that he had been thus compelled to pay, claiming that they were all liable for the act of Guy, the pilot in charge. The defendants, as a body, excepted to the libel on the ground that they were not jointly liable for the act of Guy. The question was argued, and the exception overruled, the court holding in its opinion that the members of the association were liable (127 Fed. R., 228).

Thereupon the defendants answered, denying liability on the facts. On the merits, the court decided that the fault was with the pilot and that the members of the association were liable, and gave judgment against them for the sum of $3,175, with interest from February 8, 1901, and $244.70 costs (135 Fed., 429). Thereupon they appealed to the United States Circuit Court of Appeals.

On the hearing in the latter court, it certified up to this court the following questions for its instruction:

First. Are the members of the unincorporated association of pilots regularly licensed under the statutes of Virginia, organized as shown by the above statement of facts, and conducting its business as thereby shown, a partnership?

Second. If it is a partnership, are its members who are regularly licensed pilots under the statutes of Virginia liable

as such to owners of vessels piloted by them for the negligence of each other?

Third. If the members of this association do not technically constitute a partnership, are they nevertheless jointly liable to third parties whose vessels they navigate as pilots for the negligent acts of each other?

The present hearing is upon those questions.

ARGUMENT.

Question I.

The Defendants are a Partnership and Liable for the Acts of Guy.

1. There is Such a Community of Profits and Losses Shown as to Constitute the Virginia Pilot Association a Partnership.

The third paragraph of the libel (R., 2) charges that the pilots have formed themselves into an unincorporated association, called the Virginia Pilot Association; that they have agreed among themselves to take turns in boarding vessels which are required to take a pilot; that by a further agreement the fees due for the individual pilot services are paid into a common fund and put in bank to the credit of the said Virginia Pilot Association; that as members of such association they own various property, including pilot boats, office furniture, etc.; that the fees collected from vessels for pilotage constitute a common fund out of which they pay all expenses incident to the business, including office expenses, expenses of operating their boats, etc., and the balance remaining after such expenses is divided among the parties; that the charges for pilotage are made out in the name of the

Virginia Pilot Association, and the bills against the said business are paid by checks of the Virginia Pilot Association.

The exception admits the truth of these allegations, but independent of that technical ground, the answer of W. T. Stanworth, one of the defendants, to the interrogatories annexed to the libel says (R., 3):

"6. How are the bills for pilotage made out, and in whose name? File with this answer a copy of one of the blank bills. A. They are made out in the name of the Virginia Pilots Association, except in cases of national vessels and disputed bills.

"7. When collections of pilotage are made, where are they put and to whose credit are they deposited? A. Sometimes in the safe in the office; sometimes deposited in bank to the credit of the Virginia Pilots Association.

"8. When bills are paid by check, how is the check signed? File one of your blank checks with this answer. A. Signed by the president, countersigned by the secretary then acting as such.

"9. What is the agreement among the members of the association as to the manner in which the profits are divided among each other, and how are the profits ascertained? A. At that time, net profits were divided equally according to the number of days a pilot was upon the active list, to say from thirty to thirty-five days, after the fixed expenses and necessary charges of the keeping of its equipment up to a seaworthy standard have been deducted from the gross earnings for this length of time."

This shows a clear community of profits and losses which, under the most rigid rules that could be applied, constitutes them a partnership.

In *Fleming v. Lay,* 109 F., 952, a number of owners of towboats formed themselves into an association and put in all their boats, adopting uniform rates, and divided the net profits among themselves in certain proportions. They were held liable as a partnership for the negligence of one of the

tugs inflicting injury upon a vessel in tow. In the opinion the court says:

"The law in respect to the facts necessary to constitute the relation of partnership has been at times in a somewhat unsettled state in many jurisdictions, but in the decisions of the Supreme Court of the United States we do not find any substantial variation of the doctrine expressed by Mr. Justice Gray in delivering the opinion of the court in *Meehan v. Valentine*, 145 U. S., 611; 12 Sup. Ct., 972; 36 L. Ed., 835, wherein he said, at the opening of the opinion, that 'the requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits;' and, again, after discussing the authorities: 'In the present state of the law upon this subject, it may, perhaps, be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions.' In the case of *Ward v. Thompson*, 22 How., 330, 16 L. Ed., 249, referred to by Mr. Justice Gray in connection with the first of the above quotations, the decision turned upon the question whether, by the stipulations contained in a contract between the parties relating to the employment of the steamer 'Detroit' during the year 1852-'53, a partnership was created. The material facts were thus summarized by Mr. Justice Grier:

" 'The Wards contributed a steamboat, to be put into a line for freight and passengers, which had also a contract for carrying the mail. Thompson contributed the good will of an established line, together with his care, skill, and experience. He is to have the general management of the business, and the selection of the officers and crew; but the clerk, or receiving and disbursing agent, is to be appointed by the Wards, and to be under their control. The receipts of the steamer are to be applied (1) to pay the expenses; (2) insurance; (3) six thousand dollars to Ward; (4) three thousand dollars to Thompson; (5) the balance of the profits to be equally divided.'

"The learned justice then proceeds to say:

" 'Here we have everything necessary to constitute a partnership: First, the parties have joined together to carry on a certain adventure or trade for their mutual profit—one contributing the vessel, the other his skill, labor, and experience, etc. Second, there is a communion of profits on a fixed ratio.'

"It is extremely difficult to distinguish that case from the present in any essential particular. In that, the Wards contributed their vessel, and Thompson contributed his skill and labor. In this, the parties each contributed a vessel and their skill and labor. In that, one of the parties managed the business. So, in this. In that, the running expenses were paid out of the joint earnings. It was so here. The net earnings were divided between the parties contributing, and that was the stipulation here. What is of great significance, in both cases the profits were owned by all the parties, and they shared in them as principals. None of them received, as agent or in any other capacity, a sum out of profits which belonged to others. Moreover, in the case before us, the owner of each of the tugs was, by reason of his sharing in the ultimate profits, interested in all the sums earned in the operations of each, and correspondingly the operations of each were in the general business of all. It is not important that the minor stipulations in contracts of partnership vary. The subordinate incidents may differ, but if the enterprise is aimed to secure a joint profit which is to be divided between those contributing to the business as principals, the distinguishing features of a partnership exist. If it follows from the existence of a partnership that each should have the power of agency, it may be answered in the present case that each has delegated his power in that regard to the general manager, who thereafter, by consent, exercises the powers of each. Indeed, such delegation of power to a common agent is not an infrequent incident to the business of partnerships. It is not material that there should be any express stipulation that the losses should be borne equally in order to create a partnership. Indeed, some of the authorities hold that it is not essential to a partnership that there should be a liability to share losses. However that may be, the failure to make an express agreement upon that subject is not important, for the liability will be implied. 'Except in cases specifically provided for by statute, an agreement to share profits, nothing

being said about losses, amounts *prima facie* to an agreement to share losses also, for it is but fair that the change of gain or loss should be taken by the same persons; and it is natural to suppose that such was their intention, if they have said nothing to the contrary.' 1 Lindl. Partn. (Wentworth's Am. Ed.), 12, and see English and American cases there cited; *Bank v. Gallaudet,* 120 N. Y., 298; 24 N. E., 994. The last of the above quotations from the opinion of Mr. Justice Gray seems to us to express with great exactness the rule of law upon the subject as deduced from the decisions of that court, as well as that resulting from the modern decisions elsewhere. *Vandewater v. Mills,* 19 How., 82, 15 L. Ed., 554; *Berthold v. Goldsmith,* 24 How., 536, 16 L. Ed., 762; *Beauregard v. Case,* 91 U. S., 134, 23 L. Ed., 263. Applying that rule to the present case, it must be held that a partnership was created by their agreement."

In *Brown v. Higginbottom,* 5 Leigh, 583, a party, having leased a farm, made an arrangement with another party that the latter should furnish laborers and the former should manage it, and that the net profits, after deducting expenses, should be divided between them. The court held that this constituted a partnership.

This rule has been applied to unincorporated associations organized for profit. For instance, in *Keasley v. Codd,* 2 C. & P. (12 E. C. L.), 408, which was a suit by a harness-maker against an unincorporated company, called the London Carrier Company, the following was the ruling:

"Abbott, C. J.: Well? One must pay for all.

"Denman, for the defendant: I am in a situation to show that the company was never regularly constituted.

"Abbott, C. J.: That will make no difference. It is important that the public should know, that if persons connect themselves with a company of this description, they are every one of them liable to pay the demands upon it."

This rule was applied to a co-operative association in *Davison v. Holden,* 55 Conn., 103; 10 Atl., 515. And it has been

applied to corporations whose organization was absolutely void.

McGovern v. Robertson, 5 L. R. A., 589.
Kaiser v. Bank, 56 Iowa, 104.
Jones v. Murphy, 93 Va., 214.
Robbins v. Butler, 24 Ill., 387, 426.
R. Co. v. Pearson, 128 Mass., 445.
Frost v. Walker, 60 Me., 468.
Kramer v. Arthur, 7 Pa. St., 165.
Ricker v. Trust Co., 140 Mass., 346, 348; 5 N. E., 284.

It is no answer to this that the pilots did not intend to form a partnership. Men always intend the legal consequences of their own acts, and if their acts constituted a partnership, they cannot be heard to say that such was not their intention.

"It is sometimes said that, in order to constitute a partnership, the parties must have intended to assume that relation towards each other. But by this it is meant to say they must have intended to make such stipulations as in law constitute a partnership, and not that they intended the conclusion without regard to the conditions upon which it results as matter of law. It certainly cannot be meant to say that, where the parties have entered into an agreement which contains all the incidents of a partnership, the mere unexpressed mental apprehension of its effect will control the legal consequence. 'If,' says Lindley, 'they have in fact stipulated for all the rights of partners an agreement that they shall not be partners is a useless protest against the consequences of their real agreement.' 1 Lindl. Partn. (5th Ed.), 11."

Fleming v. Lay, 109 Fed., 955-956.
See, also, *Davison v. Holden,* 55 Conn., 103; 10 Atl., 575.
Mechem on Partnerships, sec. 43, p. 31.
Jones v. Clifford, 5 Fla., 510.

2. Even if the Pilots are Public Officers, This Does Not Affect the Question.

At the trial in the lower court it was argued that the pilots are public officers, and that there can be no partnership in a public office, and hence that they could not be liable as partners to the libellant.

The answer to this position is manifold:

(*a*) They are not such public officers as cannot go into partnership. Lawyers are as much public officers as they, but certainly, lawyers can form a partnership. The true doctrine on this subject is that a public officer cannot so far form a partnership as to allow his partner to perform any of his duties, which, to a certain extent, are personal; but this doctrine does not prevent two public officers from going into a partnership, each performing his own duties and merely dividing the profits. There is certainly nothing personal in the act of the pilots, for the pleadings show that they take turns in tendering their services. The Virginia statute requires the master of a vessel to take the first one that offers. Hence, so far as the ship at least is concerned, she has not the opportunity of any selection as among them. They are classified according to length of service, and all are supposed to be equally competent.

(*b*) Independent of this general principle, the Virginia law recognizes the right of pilots to form a partnership. The first act of consequence on the subject was that of May, 1755 (6 Hen. St., p. 490). This act provides:

"And whereas great inconveniences have arisen from pilots entering into combination or partnerships, which has occasioned great neglect of their duty; for prevention whereof:

"IV. Be it further enacted by the authority aforesaid, That from and after the first day of December next, no more than two pilots shall be in partnership, under the penalty of * * *."

By the act of December 26, 1792 (Va. Code 1803, vol. 1, page 240), this act is amended so as to provide as follows:

"12. No more than four pilots shall be in partnership under the penalty of $300 each, to be recovered with costs, for any person suing for the same."

By the act of January 23, 1802 (Va. Code 1803, vol. 1, pages 417-418), this last provision is repeated *verbatim*.

By the act of February 10, 1819 (Rev. Code, 1819, pages 121-123), the same provision is also repeated. And this continued in force until the Virginia Code of 1849, when all restrictions as to the number of pilots who could form a partnership were removed.

It is clear from this review of the Virginia statutes, first, that independent of these statutes, prior to 1755, pilots could form partnerships unlimited in number; that the effect of the acts between that date and the Code of 1849 was not to forbid the formation of partnerships, but merely to limit their number; that the dropping of this restrictive provision was a clear recognition of the right of the pilots to form partnerships unlimited in number from and after 1849.

The opposing counsel in their argument spoke of these acts as enabling acts, and claimed that their repeal in 1849 merely left the general principles of law in force.

The ingenuity which can turn them into an enabling act is certainly very remarkable. They are really disabling acts, and the effect of their repeal was to remove all restrictions. This is strengthened by the provisions of the pilot law now in force, the seventh section of which (Va. Code, sec. 1960) expressly provides:

"Every pilot, *or the company to which he belongs*, shall keep one sufficient boat of at least thirty feet keel, to which he shall be attached, and in which he shall cruise. Any one, acting as a pilot without having such a boat, shall forfeit one hundred and fifty dollars to any person who may sue for the same."

The argument of public policy in favor of holding them liable as a partnership is all on the side of the libellant.

3. Even if the Pilot Association is an Illegal Partnership, This Can Only be Set Up as Among Themselves and is No Answer to a Suit Against Them by a Third Party.

In *Brett v. Beckwith*, 3 Jur. N. S., 31, certain underwriters had gone into partnership contrary to the English statute on the subject. A party to whom they issued a policy, who was not then aware of their partnership, as one was a secret partner, sued them for a loss. The secret partner defended on the ground that the partnership was illegal. The court emphatically criticised his attempt to plead his own illegal act in defense to an obligation.

See, also, Mechem on Partnerships, sec. 20, p. 16.
Hale v. Hale, 4 Beav., 369.
U. S. v. Baxter, 46 Fed., 350.

This is certainly a very dangerous point for the pilots to make. If one of them should sue for an accounting, they might regret the record in this case.

4. There is No Well-considered Case Holding Such an Association Not to Constitute a Partnership.

But two cases can be found that even apparently favor this view. The first of these is *Mason v. Ervine*, 27 Fed., 459. It is a publication of a finding by Judge Pardee, and is not a formal opinion. It merely holds that the Louisiana pilots do not constitute a commercial partnership under the laws of Louisiana, which is the only partnership where members are liable for each other. In order to understand this decision, it is necessary to read articles 2824 to 2826 of the Louisiana Code. These articles provide as follows:

"Art. 2824. Partnerships are divided, as to their objects, into commercial partnerships and ordinary partnerships.

"Art. 2825. Commercial partnerships are such as are formed:

"1. For the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture.

"2. For buying or selling any personal property whatever, as factors or brokers.

"3. For carrying personal property for hire, in ships or other vessels.

"Art. 2826. Ordinary partnerships are all such as are not commercial; they are divided into universal and particular partnerships."

Hence this decision merely held that they were not a commercial partnership. It did not hold that they were no partnership at all.

The other decision apparently adverse is that of the *City of Reading*, 103 Fed., 696; 108 Fed., 679. There, a vessel had been anchored outside the regular anchorage grounds, and while lying in that place had a collision, and was libeled by the other vessel under the allegation that she was anchored in an improper place. The district court held, in the first place, that the vessel was not guilty of negligence, as the master could not know the channel, and had employed a regular pilot, and that the vessel was therefore not liable, whether the pilot was negligent or not. This ought to have ended the case, but the court went on and held that even if the pilot was negligent, the association was not liable for his acts; that he was not the agent of the association, and that the association itself does not attempt to take charge of vessels, and is largely a beneficial organization, and that it has no power to contract for pilotage service.

The ruling on this point is contrary to the *China*, 7 Wall., 53, that a vessel is liable for the negligence of a compulsory pilot, and yet that case is not referred to.

The other ruling is equally unsound. No question of power can arise in the case of an unincorporated association.

Such a question may arise in a chartered association, for its acts may be *ultra vires*, but an unincorporated association is not limited by any charter; and the acts of its members, or the members composing it, are its own acts. It is a truism to say that the association does not attempt to take charge of vessels. How can an association of thirty men take charge of a vessel except by sending one of their number aboard? When that one man takes charge, the whole association takes charge. It is not a question of principal and agent, but a question of partnership. The statement in the opinion that the pilot has no power to bind his associates and that his contracts do not relate to the purposes of the association stands in striking contrast to the fact—for it is a fact in this case—that the money realized from his acts is put into a common fund and kept by the association. There must be something peculiar in the organization of the Delaware Association, which differentiates it from the Virginia organzation. Whether in that association the pilot gets the separate fee or they are paid into a common fund does not appear, and yet this is important on the question of partnership; but it is clear from the report of the case that the Delaware Pilot Association does not make contracts in its own name. It is equally clear from the record in this case that the Virginia Pilot Association does. As shown by the quotations in another connection, the bills are made out in its name, checks made payable to it, and checks drawn by it. This distinguishes it from the Delaware Association and renders the case not in point on the facts.

This decision was affirmed on appeal. The appellate court, however, expressly held that neither the vessel nor pilot was in fault on the score of her anchorage, and that really disposed of the case. It went on, however, in the last page of the opinion, to pass upon this question, but it merely quoted the opinion of the district judge, holding, on the organization of that association, that no contracts were made with the association direct. On the other hand, the pleadings admit,

in this case, that the Virginia Association acts as an association, that the service rendered by the pilot was for the benefit of the association, the fees collected not by him, but by the association, and put in bank to the credit of the association. The case, if sound at all, is therefore distinguishable on the facts. In fact, the Delaware Association must be a mere beneficial organization, for an examination of the briefs filed in that case on appeal shows from its citations that such was the real point in that case. The first citation in the brief of the successful party in that case was from section 5, Book 1, chapter 1, of Lindley on Partnership, which is headed, "Clubs and societies not having gain for their object," and the cases cited by counsel in the brief were, every one of them, cases of organizations which did not have gain for their object. The citation from Lindley itself contains the following sentence:

"It follows from the proposition established in the foregoing pages that no partnership, or quasi-partnership, subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners. Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members as such liable for each other's acts."

Question II.

The Members of Such a Partnership are Liable for Each Other's Torts, if in Furtherance of the Objects of the Association, and if the Fruits of Their Labors are Received by the Association.

Hyrne v. Erwin, 23 S. C., 226; 55 Am. Rep., 15.
Fleming v. Lay, 109 F., 952.
Mellors v. Shaw, 1 Best & S. (101 E. C. L.), 437.
Ashworth v. Stanwix, 3 C & E. (107 E. C. L.), 700.
U. S. v. Baxter, 46 Fed., 350.
Cobb v. Abbott, 14 Pickering, 289.
Strang v. Bradner, 114 U. S., 555.

Question III.

The Pilots, if Not a Partnership, are Jointly Liable.

This is well settled by a number of decisions, as in case of joint owners of stage coaches.

Champion v. Bostwick, 18 Wend., 174.
Moreton v. Harden, 4 B. & C. (10 E. C. L.), 223.
R. Co. v. Ross, 31 N. E., 412.
Cobb v. Abbott, 14 Pickering, 289.
Steel v. Lester, L. R., 3 C. P. D., 121.
Connelly v. Davison, 15 Minn., 428, 519.

Conclusion.

All three questions should be answered in the affirmative.

Respectfully submitted,

ROBT. M. HUGHES,
For Appellee.

NORFOLK, VIRGINIA, *October* 17, 1906.

Supreme Court of the United States.

No. 90.—October Term, 1906.

Frank W. Guy, W. T. Stanworth, et al. *vs.* John A. Donald. } On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[December 3, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This case comes before us on a certificate from the Circuit Court of Appeals. It is a libel brought by the owners of a steamer against the members of the Virginia Pilot Association, and seeks to hold them all liable for the alleged negligence of Guy, one of their number. For the proceedings in the District Court see 127 Fed. Rep. 228; 135 Fed. Rep. 429. The negligence occurred when Guy was acting as pilot of the steamer and led to a collision, for which the owners of steamer paid damages to the other vessel in order to end a suit. The questions certified are (1) whether the members of the association are partners on the facts set forth; (2) whether, if partners, they are liable to owners of piloted vessels for the negligence of each other; (3) whether, if not technically partners, they nevertheless are so liable.

The facts appear in the third article of the libel, which was excepted to, and in answers to interrogatories. They are as follows: The defendants are a voluntary, unincorporated association. By their agreement they take turns in boarding vessels required by law to take a pilot, and the fees, which otherwise would be paid to the pilot that boarded the vessel, are paid, except in cases of national vessels and disputed bills, to the association upon bills made out by it, and go into a common fund, from which the association pays the expenses of the business, including office rent. At the time of the accident the net profits were divided according to the number of days the several pilots were upon the active list. The constitution and by-laws of the association are exhibited and will be referred to. It is proper to add here a few words as to the Virginia law. By the Code of 1887 a Board of Commissioners is instituted to examine persons applying for branches as pilots; and the commissioners are given "full authority to make such rules as they may think necessary for the proper government and regulation of pilots licensed by them." § 1955. There are details as to the qualification and classification of pilots and their duties, including a requirement, as to boats, of the pilot "or the com-

pany to which he belongs." § 1960. Acting as pilot without authority is punished. § 1963. Certain vessels are required to take the first pilot that offers his services or to pay full pilotage. § 1965. See § 1976. The amount of pilotage is fixed. § 1969. A personal liability is imposed for the amount, and it is to be noticed that it is a liability to the individual pilot employed. § 1978. The pilot's right to collect his account is fortified by a penalty. § 1979. The Board of Commissioners is authorized to decide any controversy between licensed pilots or between a pilot and the master, owner, or consignee of a vessel, and to enter judgment, which, if for money, may be collected by a sheriff, &c. § 1980. But a judgment of suspension against a pilot is limited in general to between one and twelve months. § 1981. And the Board cannot decide upon the liability of "a pilot" to any party injured by his negligence. § 1982. Pilots demanding or receiving more or less than their lawful fees are subjected to a forfeiture. § 1985. And certain further duties are prescribed.

The rules of the Board of Commissioners provide for the appointment by them of a supervisory board from the Pilot Association, to report to the President of the Board of Commissioners all cases of insubordination, breach of rules, &c., or any misdemeanor, afloat or on shore, on the part of any member of the Association. A pilot desiring to go off duty for five days or longer is required to apply to the Board of Commissioners. Suspensions, by whomsoever ordered, are to be reported within twenty-four hours to the President of the Board, and are to be acted upon by the Board. All pilots are required to look out for their turns, and each pilot is held responsible for whatever turn he may hold upon the list, officers being prohibited from having anything to do with the swapping of turns. It will be seen that the rules of the Board, made under the authority of this statute, recognize the Association, as does the Code, more vaguely, in § 1960, quoted above. The rules also recognize the substitution of turns for the free competition of which there are traces in the code. The rules tacitly assume that every pilot is a member of the Association. All punishment and suspension is in the hands of the Board, except, as may be added here, that the by-laws of the Association impose a fine of ten dollars for a first violation of the rules of the Association, of twenty dollars for a second offence, and provide that a third shall be reported to the Board of Pilot Commissioners. Thus substantially the whole government of the Association is in the hands of the Board.

The questions certified very properly go beyond the question of the existence of a partnership. As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied. The substance of the case is this: A man who is responsible before the law is alleged to

have committed a tort. It is proposed to make other men pay for it who not only have not commanded it or any act of which it was the natural consequence, but who would have prevented it if they could, and who have done what they could to prevent it, so far as the qualifications and employment of the pilot were not taken out of their hands by law. Why they should have to pay is the problem recurring through agency in all its forms, and whatever may be thought of some of the reasons that have been offered when the obligation has been imposed, it is certain that something more and better must be found than that the defendants divide the pay for the work that they have done, or that it is a convenience to the party aggrieved to discover a full purse to which to resort.

Whether the ground be policy or tradition, such a liability is imposed, as we all know, in many cases. When a man is carrying on business in his private interest and entrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself. But there is always a limitation. It is true that he is not excused by care in selection or orders sufficient to secure right conduct, if obeyed. But when he could not select, could not control, and could not discharge the guilty man, he does not answer for his torts. As a familiar instance, the servants of an independent contractor are not the servants of the contractee. The liability of a vessel when in the hands of a compulsory pilot is not put upon the ground that the pilot is the agent or servant of the owners, and therefore does not bear upon the question. *The China*, 7 Wall. 53.—Now, we are not curious to inquire what form of test shall be accepted as the most profound for the existence of a partnership when considering liability for debts; but it is plain that when we are considering a liability for torts under the circumstances supposed no stricter or different criterion ought to be applied than in those cases where agency is the admitted ground. The rule, however stated, presses to the verge of general principles of liability. It must not be pressed beyond the point for which we can find a rational support.

So far as appears, the Virginia Pilot Association had no one of the three powers which we have mentioned. Seemingly it could neither select nor discharge its members, as certainly it could not control or direct them in the performance of their duties as pilots. To take the last first, it is quite plain that the Virginia Code contemplates a bond of mutual personal liability between the master of a vessel and the pilot on board. If we imagine such a pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all of his fellows passed a vote on the spot that he should change and shouted it through a speaking trumpet, he would owe no duty to obey, but would be as free as before to do what he thought best. Then as to the selection of members, there is no indication of any in the Code, the rules of the board,

or the constitution and by-laws of the association. Nothing is said about membership, and the implication is plain that a condition of the association being permitted by the Board to exist is that every pilot belongs to it. Probably, while it exists, a pilot scarcely would find it possible to compete from the outside. It is still plainer that the only provision for expulsion is that which would follow upon a pilot's being deprived of his license. The association has no power over that.

All that there is upon which to base a joint liability is that the pilots, instead of taking their fees as they earn them, accomplish substantially the same result by mingling them in the first place and then, after paying expenses, distributing them to those on the active list according to the number of days they respectively have been there. Apart from the possible slight difference between the proportion of days on the active list and days of active service, the case is the same as if each pilot kept his fees, merely contributing to keep up a common office from which his bills might be sent out and where a few details of common interest could be attended to. In the latter case this suit hardly would have been brought. The distinction between it and the one at bar is not great enough to justify a different result. See *The City of Dundee*, 108 Fed. Rep. 679, 684; s. c. 103 Fed. Rep. 696. The second and third questions certified are answered No.

True copy.

Test:

Clerk Supreme Court, U. S.